

B. [§6.3] Punitive Damages

Several of the consumer protection statutes discussed in chapter 5 specifically provide that a plaintiff may, under certain circumstances, recover damages in addition to actual damages. In general, the plaintiff may recover punitive damages, in addition to actual damages, in an action for the breach of an obligation not arising from contract, when the plaintiff can show by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. CC §3294(a). The definitions of malice and oppression in CC §3294(c) include despicable conduct as an element. For a comprehensive discussion of punitive damages, see 6 Witkin, *Summary of California Law, Torts* §§1327–1348 (9th ed 1988).

An employer's liability for punitive damages based on the acts of an employee is limited in CC §3294(b) to situations in which the employer (1) had advance knowledge of the employee's unfitness and employed him or her with a conscious disregard of the rights or safety of others, (2) authorized or ratified the employee's wrongful conduct, or (3) was personally guilty of fraud, oppression, or malice. For a corporate employer, this must be on the part of an officer, director, or managing agent of the corporation.

C. [§6.4] Bad Checks (CC §1719)

Under CC §1719(a)(1), the payee of a check issued on insufficient funds has a cause of action for the amount of the check and a \$25 service charge for the first bad check and \$35 for each subsequent bad check to that payee. If the drawer of the check does not pay the full amount within 30 days of a written demand, the payee may recover treble damages for any amount not paid within 30 days, plus any amount not paid. CC §1719(a)(2). Treble damages may be recovered for not less than \$100 but not more than \$1500. CC §1719(a)(2). The payee may not recover the service charge in addition to treble damages. CC §1719(a)(2). The cause of action may be brought in small claims court if it does not exceed the jurisdictional limit. CC §1719(e).

A cause of action for treble damages under CC §1719 has the following elements:

- A dishonored check. However, the check must have been dishonored because of insufficient funds, because the maker had no account with the bank, or because the maker instructed the drawee to stop payment. CC §1719(a)(6).
- A written demand for payment, mailed to the maker, that informs the

maker of the provisions of the statute made by certified mail. Ordinary mail or personal delivery does not suffice. The plaintiff need only prove *mailing* by certified mail and not actual receipt to satisfy this element. This prevents the maker from circumventing the statute by simply refusing to sign the certified mail receipt. CC §1719(a)(2).

- Failure of the maker to pay the full amount of the check within 30 days after the demand. CC §1719(a)(2).

A drawer is liable for damages and costs only if all the requirements of CC §1719 have been satisfied (CC §1719(j)(1)) and will be liable only once on each check for damages, costs, and service charges (CC §1719(j)(2)).

A person shall not be liable under this section if he or she provides to the payee written confirmation from a financial institution that the check was returned because of the institution's error, or that the account had insufficient funds as a result of delay in the scheduled transfer or posting of a direct deposit of a social security or government benefit assistance payment. CC §1719(a)(4)–(5).

An assignee may recover the same service charge, damages, and costs as the original payee. CC §1719(i).

A payee is barred from collecting the service charge, the costs to mail the written demand, or treble damages if the maker stops payment in order to resolve a good faith dispute with the payee. CC §1719(a)(3). The payee is entitled to the damages only on proving by clear and convincing evidence that there was no good faith dispute, as defined, that must be determined by the trier of fact. CC §1719(a)(3), (b). A form of the required notice to the maker is set forth for stop payment cases. See CC §1719(c). The court may not award damages or costs for a stop payment unless it receives into evidence a copy of the written demand and a signed, certified mail receipt showing its delivery, or attempted delivery if refused, to the drawer's address. CC §1719(d). To recover damages on a stop payment, the payee must also show to the satisfaction of the trier of fact that the payee made a reasonable effort to reconcile and resolve the dispute before pursuing the dispute in the courts. CC §1719(e).

In addition to its unusual reference to small claims court, CC §1719 is extraordinary in that it permits recovery of statutory treble damages, and its mandatory language (“shall be liable”) deprives the judge of discretion to award a smaller amount of damages. *Mughrabi v Suzuki* (1988) 197 CA3d 1212, 243 CR 438. See also CC §1719(h) (CC §1719 remedy requirements mandatory on a court). Under CC §1719, liability is imposed for the “amount owing on the check” (if not paid within 30 days of the written demand), not for the “amount written on the check.” Thus, there must be

an enforceable obligation before penalties may be imposed under CC §1719. *Cohen v Disner* (1995) 36 CA4th 855, 861, 42 CR2d 782.

D. [§6.5] Injury Caused by Certain Unlicensed Persons (CCP §1029.8)

Code of Civil Procedure §1029.8 provides that any unlicensed person who causes injury or damages to another person as a result of providing goods or services for which a license is required under specified provisions of the Business and Professions Code shall be liable to the injured person in a civil action for treble damages. The court may also in its discretion award costs (and attorneys' fees in other than small claims court) to a prevailing plaintiff. This section is not to be construed to confer an additional cause of action or to affect or limit any other remedy including, but not limited to, a claim for exemplary damages. Exceptions to application of the section are set forth in CCP §1029.8(d)–(e).

III. [§6.6] INTEREST CLAIMS

Every person with a right to recover damages that vest on a particular day, and are certain, or capable of being made certain by calculation, is also entitled to recover interest at the legal rate on the damages from that day, except for periods during which the debtor is prevented by law or by the creditor from paying the debt. CC §3287(a). Civil Code §3287(a) allows recovery of prejudgment interest in causes of action other than contract; the crucial factor is whether the damages were readily ascertainable. See *Marine Terminals Corp. v Paceco Corp.* (1983) 145 CA3d 991, 193 CR 687.

Every person with rights to recover damages under a judgment based on a contract action in which the claim was unliquidated may also recover interest on it from a date, fixed by the court in its discretion, before entry of judgment but not earlier than the date the action was filed. CC §3287(b).

Under CC §3291, the plaintiff may claim interest on damages in a personal injury action resulting from a tort. When the statutory conditions are met, CC §3291 mandates an award of prejudgment interest, but only for the personal injury portion of a more general total recovery. *Morin v ABA Recovery Serv., Inc.* (1987) 195 CA3d 200, 240 CR 509.

Under CC §3288, in actions other than contract and in every case of oppression, fraud, or malice, interest may be awarded “in the discretion of the jury.” The small claims court judge, sitting as the trier of fact, has discretion to award interest under this provision, because there is no jury in small claims court cases. See *Nathanson v Murphy* (1955) 132 CA2d 363, 373, 282 P2d 174. For a discussion of some common problems relating to interest claims, see §§6.7–6.10.